DOCKET FILE COPY ORIGINAL

OFFICE OF THE GENERAL COUNSEL

M E M O R A N D U M

TO: Chief, Dockets Branch

FROM: Associate General Counsel, Litigation Division

SUBJECT: Denver Area Educational Telecommunications Consortium, Inc., and American Civil Liberties Union v. FCC, No. 93-1171. Filing of a new Petition for Review in the United States Court of Appeals for the District of Columbia Circuit.

DATE: February 25, 1993

Docket No(s). MM Docket No. 92-258

File No(s).

This is to advise you that on February 22, 1993, Denver Area Educational Telecommunications Consortium, Inc. and American Civil Liberties Union, filed with the United States Court of Appeals for the District of Columbia Circuit a:

X Section 402(a) Petition for Review
___ Section 402(b) Notice of Appeal

of the following FCC decision: In the Matter of Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992, FCC 93-72, released February 3, 1993. Challenge to Section 10(a) of the Cable Television Consumer Protection and Competition Act of 1992 that permits cable operators to enforce voluntarily a written and published policy of prohibiting indecent programming on commerical leased access channels on their systems.

Due to a change in the Communications Act, it will not be necessary to notify the parties of this filing.

The Court has docketed this case as No. 93-1171 and the attorney assigned to handle the litigation of this case is unassigned.

Daniel M. Armstrong

Daniel M. Armstrong

cc: General Counsel
Office of Public Affairs
Shepard's Citations

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DENVER AREA EDUCATIONAL TELECOMMUNICATIONS CONSORTIUM, INC. and AMERICAN CIVIL LIBERTIES UNION,

Petitioners,

-v.-

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents.

No. 93-1171

Filed: 2/22/93

PETITION FOR REVIEW

Pursuant to 47 U.S.C. §402(a) and 28 U.S.C. §§2342 and 2344, the Denver Area Educational Telecommunications Consortium, Inc. ("DAETC") and the American Civil Liberties Union ("ACLU") hereby petition this Court for review of the First Report and Order of the Federal Communications Commission ("the Commission") in MM Docket No. 92-258. The First Report and Order, FCC No. 93-72, was adopted on February 1, 1993, released on February 3, 1993, and published (in an abbreviated version) in the Federal Register on February 11, 1993.

Venue in this Court is proper under 28 U.S.C. §2343. This petition is timely filed under 28 U.S.C. §2344.

A copy of the First Report and Order is attached to this petition.

1. Petitioners and their members are aggrieved by and suffer injury from the Commission's First Report and Order, which impinges on their First Amendment rights. By establishing a system of content-based censorship for leased access channels and delegating much of that censorship power to cable operators, the Commission has impeded the dissemination of such programming and hindered the freedom to view it over leased access channels.

2. Denver Area Educational Telecommunications Consortium, Inc., a Colorado non-profit corporation, is a cable programmer operating a leased access cable service known as The 90's Channel, presently reaching 500,000 basic cable subscribers to cable systems in Arizona, California, Connecticut, Colorado, Maryland, and Michigan. The 90's Channel carries a wide variety of material, much of it both controversial and otherwise unavailable to viewers. It transmits documentaries and magazine programs on political, environmental, labor, and social topics, and many of its programs express opinions, which are generally liberal. The 90's Channel does not carry pornography, and has never carried a full-length program that dealt with sexuality per se. Nonetheless, a small but important portion of its programming has dealt with such topics as arts censorship, gay rights, feminism, prostitution, and AIDS, and its coverage of those matters has on occasion inextricably included discussion of sexuality and the description or depiction of sexual activity.

3. The ACLU is a nationwide, nonpartisan organization with nearly 300,000 members, many of whom are viewers of leased

access cable channels. It is dedicated to the protection and promotion of individual rights and liberties, primary among them freedom of speech. In 1990 the ACLU established an Arts Censorship Project specifically to combat an increased climate of censorship in the United States, including in particular efforts to suppress creative expression and information about sexual activities and sexual orientation. Many of its members subscribe to cable television in their communities and view leased access channels.

4. Petitioners seek review of the Commission's First Report and Order in MM Docket No. 92-258, which establishes a system of censorship for leased access programming, and of the underlying statutory provision on which it is based, Section 10 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385, 106 Stat. 1460 (1992). Under the statutory and regulatory scheme,

(a) each cable operator is for the first time delegated the power to prohibit programming on leased access channels "which, it reasonably believes, describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards," despite the injunction of 47 U.S.C. §532(c) that "[a] cable operator shall not exercise any editorial control over any video programming provided" over leased access cable channels;

(b) program providers must identify as "indecent" every leased access program that contains any description or depiction of sexual activity or organs that could be considered "patently offensive as measured by contemporary community standards for the cable medium," and cable operators may further require programmers to certify all leased access programming as indecent or not;

(c) any program identified as indecent by the program provider not prohibited outright must be placed on a blocked channel accessible only upon a written subscriber request for unblocking which need not be honored for thirty days, and any program identified as indecent by cable operators (if they exercise the prescreening power afforded by Section 10) may be blocked or channelled to "time periods of their choosing"; and

(d) operators have been stripped of their longstanding immunity from prosecution for programming on leased access channels "that involves obscene material," thereby strongly inducing them to censor materials with sexual content.

5. The First Report and Order violates the First and Fifth Amendments because: (1) it establishes a content-based system of prior restraints on protected speech, without pursuing the least restrictive means available to implement effectively any

compelling governmental interest; (2) the identification and certification requirements are unduly vague and force programmers to self-censor protected speech; and (3) the rules discriminate against certain speakers and their speech by requiring the blocking of "indecent" leased access programming, while at the same time identical programming by cable operators or other programmers is not regulated at all, and identical speech broadcast on the public airwaves is not blocked but only channeled to evening time periods.

6. The regulatory scheme is seriously disruptive to leased access programming and impermissibly delegates to private parties the power to censor the speech of others in a public forum. The harm it causes is gratuitous, because 47 U.S.C. §544(d)(2)(A) already requires cable operators to make "lockboxes" available to all cable subscribers that enable them to lock out any channel or program that they choose. The Commission and the courts have previously recognized that lockboxes are an effective, content-neutral way for parents to prevent their children from being exposed to programming they deem inappropriate. The First Report and Order is arbitrary and capricious and otherwise not in accordance with law.

7. The requirement that program providers identify programs as indecent goes into effect 90 days after publication in the Federal Register, or May 12, 1993 (see First Report and Order at 31), notwithstanding the Commission's stay of the effectiveness of other portions of the First Report and Order until

"120 days from the date of publication in the Federal Register," or June 11, 1993 (id. at 34). The Commission denied petitioners' request for a stay pending completion of court review (id. at 31 n. 52). Consequently, in order to maintain the current status quo pending resolution of the grave First Amendment and statutory issues presented by the censorship scheme established in the First Report and Order, petitioners will shortly be moving this Court pursuant to 47 U.S.C. §402(c) for a stay, or in the alternative for an expedited schedule for briefing and determination.

WHEREFORE, being aggrieved by the Commission's First Report and Order in MM Docket No. 92-258, petitioners respectfully request that this Court:

1. vacate and set aside the Commission's First Report and Order;

2. declare unconstitutional Section 10 of the Television Consumer Protection and Competition Act of 1992, or in the alternative remand this matter to the Commission with instructions to issue a revised decision to correctly reflect the requirements of the First Amendment and 47 U.S.C. §532(c)(2); and

3. grant such other and further relief as may be just and proper.

Respectfully submitted,

CHARLES S. SIMS
LISOLETTE E. MITZ
PROSKAUER ROSE GOETZ & MENDELSOHN
1585 Broadway
New York, New York 10036
(212) 969-3000

MARJORIE HEINS
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
ARTS CENSORSHIP PROJECT
132 West 43rd Street
New York, New York 10036
(212) 944-9800

Counsel for Denver Area Educational
Telecommunications Consortium, Inc.
and the American Civil Liberties Union

Of Counsel:
ARTHUR B. SPITZER
AMERICAN CIVIL LIBERTIES UNION
OF THE NATIONAL CAPITAL AREA
1400 20th Street, N.W.
Washington, D.C. 20036
(202) 457-0800

February 22, 1993